Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1964

No. 996

GREGORY COMULADA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
Attorney for Petitioner
401 Broadway
New York, N. Y.

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Gregory Comulada, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on January 15, 1965.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on January 15, 1965. On the 12th day of February, 1965, Mr. Justice John M. Harlan, granted an order extending the

time of the petitioner to file his petition for a writ of certiorari to and including March 16, 1965. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

The questions specifically raised by the petitioner Gregory Comulada, are:

I. Was the destruction of handwritten notes by Narcotics Agent Coursey in violation of Section 3500 of Title 18, United States Code, and should his testimony have been stricken?

II. Did Agent Leya's testimony that the special employee, Saul Scott, was not available, deny the defendant-appellant, Comulada, a fair trial?

D. Statutes

The statutes involved are:

United States Code, Title 21, Sections 173 and 174, Title 18, Section 3500.

All of the foregoing are set forth in Appendix B annexed to this petition.

E. Summary Statement of Matters Involved

The appellant was the sole person named in a one count indictment alleging a sale of narcotics. He was found guilty

as charged and sentenced as a prior narcotics offender to Fifteen (15) years imprisonment, and fined the sum of Twenty Thousand ($20,000.00) Dollars. He is now serving the aforesaid term of imprisonment. His conviction was affirmed by the United States Court of Appeals for the Second Circuit.

F. Reasons for Granting Writ

I

The destruction of handwritten notes by Narcotics Agent Coursey was in violation of Section 3500 of Title 18, United States Code, and his testimony should have been stricken.

The Supreme Court has delineated the limits of §3500 of Title 18 U.S.C. in many respects and areas. In fact, it has been said to be "peculiarly the province of this Court." (*Evola, et al.* v. *U. S.*, 375 U.S. 32 (1963).) (See dissenting opinion of Mr. Justice Clark.) The Court, however, has not expressed itself on the recurrent vexation suffered by a defendant when confronted with a Government witness who has destroyed his notes. To be sure, this destruction merits attention and consideration, having been characterized as an "important question" in *Campbell* v. *United States*, 365 U.S. 85 (1961).

The facts of this case crystallize the issue, though they were apparently mis-apprehended by the Court below. The petitioner contends that he was prejudiced by the destruction of certain notes, and that the notes were not incorporated in any other report made available to him.

The Government could only call two possible witnesses to the transaction itself which formed the case against the

petitioner, Gregory Comulada. One was the narcotics agent, John T. Coursey, and the other was a special employee, Saul Scott. Agent Charles J. Leya, Jr. also a narcotics agent, generally surveilled the situation, and of course, was competent to testify in certain corroborative detail as to some of the substance of the alleged transaction involving Comulada, Scott and Coursey. Scott was not called as a witness. So basically, the case against Comulada resolved itself into a single witness case—that single witness being John T. Coursey. cf. *United States* v. *Hernandez,* 282 F. 2d 71 (2nd Cir. 1960).

On cross-examination Coursey testified that he had prepared 3 x 5 cards on which he had made memoranda as to the incidents about which he gave testimony. He did not recall how many cards he had for this case, but indicated that they were prepared almost contemporaneously with the incident noted.*

These cards were destroyed when a memorandum report, Government's Exhibit 6 for Identification, was prepared. Coursey testified that he had no independent recollection as to the material on those cards concerning Comulada, and that he did not use the cards to prepare the memorandum report, Government's Exhibit 6 for Identification (SM 34).[1]

Upon establishing these circumstances, counsel pursuant to Section 3500 of Title 18, United States Code, and in accordance with the first Campbell case, *Campbell* v.

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* Coursey testified:

"I have them in a stack, and as I do things I write them down." (SM 31)

1. "SM" refers to the page numbers in the Stenographic Minutes of the filed trial transcript.

United States, 365 U.S. 85 (1961), for a voir dire in the absence of the jury to inquire into the disappearance and destruction of these cards. Such application was denied (SM 87).

On re-direct examination, the Government attempted to rectify any possible error arising from the destruction of these cards by inquiry into the custom of the witness Coursey in the handling of the cards. Coursey's professed custom[2] of incorporating the notes in the report does not alter the facts here. The 3 x 5 cards were not used for purposes of comparison with the report in order to determine the report's accuracy.

It is against this setting that the issue urged upon this Court arises. Clearly this is not the sort of situation which was presented in *United States* v. *Thomas*, 282 F. 2d 191 (2nd Cir. 1960). There the problem arose from the destruction of notes made by an F.B.I. Agent who had interviewed a witness, and had subsequently incorporated those notes in a more or less formal report. The agent, after the preparation of the report, had compared his notes with the report, and after being satisfied that the contents of the notes were included in the report, destroyed the notes. The differences between the Thomas situation and the instant situation are marked. The notes about whose destruction Comulada complains were firstly the notes of the witness who testified, and secondly, Comulada was not given the questionable benefit of Coursey's self serving comparison of his notes with his report.

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2. "Q. What was your custom in dealing with notes? * * * A. If I made handwritten notes, when I formulated the memorandum report, I would incorporate everything in the handwritten notes in the memorandum report, and therefore, I needed the notes no longer." (SM 71)

Comulada cannot contend that the destruction of these notes was wilful and part of a design to deprive him of evidence which might tend to exculpate him. He relies, however, upon the language in *Campbell* v. *United States, supra,* where the Supreme Court indicated that at that time it did not reach the important question of the effect of non-wilful destruction of notes as opposed to wilful destruction.[3] In this light, however, it is pertinent to point out that Coursey was familiar with Jencks procedure in that he was an experienced Government witness. He had testified at least a hundred times prior to the alleged transaction between himself and Comulada, and at least twenty-five of those hundred times were in Federal courts where it was customary in his experience for a motion to be made for the production of memoranda (SM 69).

The error that the Court below found in *United States* v. *Hernandez, supra,* was predicated upon the concept that where the Government's case rests primarily upon the testimony of one witness, a variance between his trial testimony and a prior statement could have a substantial effect upon the deliberations of the jury.

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3. "If the Interview Report was not the original or a copy of the paper Staula described, and that paper was destroyed, the petitioners might have been denied a statement to which they were entitled under the statute. Thus, even if the Interview Report itself were producible, a situation might have arisen calling for decision whether subsection (d) of the statute required the striking of the testimony of the witness. The parties argue whether destruction may be regarded as the equivalent of non-compliance with an order to produce under that subsection. The Government contends that only destruction for improper motives or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances should be so regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d)."

Campbell v. *United States, supra,* at page 98.

Comulada was denied whatever benefit could have been derived from notations made almost contemporaneously with the alleged incident.

This record does not support the assumption by the Court below that destroyed notes were incorporated into an official report. The question posed initially, the effect of destruction under the circumstances of this case, has not been answered.

II

Agent Leya's testimony that the special employee, Saul Scott, was not available denied the defendant-appellant, Comulada, of a fair trial.

Comulada was deprived of testimony in another fashion as well. As indicated above, there were only two actual witnesses whom the Government could call to testify as to the alleged transaction itself; Agent Coursey and special employee, Saul Scott, also known as Saul Sapp. Only Coursey testified. On cross-examination, inquiry was directed as to the existence of Scott, his present whereabouts and his contacts, if any, of recent time with the Bureau of Narcotics. Coursey testified that he had met Scott some six months before December 20, 1961, at 90 Church Street, New York, New York, the Office of the Bureau of Narcotics. Coursey had seen or spoken to Scott last in February of 1962, and he had no idea of his present whereabouts. He also testified that Scott worked particularly with one agent, and that agent was Agent Leya (SM 64-67).

When Agent Leya was cross-examined, he testified that he had worked with Saul Scott for approximately one year and four months, and that the last time he saw or talked

with Saul Scott was in February of 1962. On October 2, 1962, the following questions and answers were asked of Agent Leya at the trial of Comulada.

> "Q. Did you check any records to determine where Saul Scott is today? A. I have inquired, yes, sir.
>
> Q. How did you inquire? A. I asked the man who he had last contacted.
>
> Q. Who was that? A. Agent Coster. (SIC)
>
> Q. When did you ask Agent Coster? (SIC) A. The end of last week, Thursday or Friday.
>
> * * * * *
>
> Q. Is that the only effort you made to find the whereabouts of Saul Scott? A. I inquired at his last address.
>
> Q. Where was that? A. Manhattan Towers Hotel.
>
> Q. Does he still reside at that hotel? A. No, sir.
>
> Q. Did you make any other efforts to locate Saul Scott? A. This is a big city.
>
> Q. You are an agent. A. That is right.
>
> Q. You are a trained police officer. A. Yes, sir.
>
> Mr. Quinlan: Your Honor, I object to badgering the witness.
>
> Mr. Krieger: I submit that it is not badgering.
>
> The Court: Objection overruled.
>
> Q. Did you make any other efforts to obtain his whereabouts? A. Yes, sir, I did.
>
> Q. Were you successful? A. No, sir, I was not.
>
> Q. It is your testimony that the last time that Saul Scott has been in contact with the Bureau of Narcotics was last February? A. To the best of my knowledge, it is." (SM 98-99)

On the basis of this testimony, the duty imposed upon the Government by *Roviaro* v. *United States*, 353 U.S. 53,

77 S. Ct. 623, 1 L. ed. 2d 639 (1957), had been met. The petitioner had been advised of the identity of the informer and also of his last known address. The last question and answer demonstrated the futility of further pursuit of this line of inquiry. Any effort to produce Scott or to ask for his production would have been an idle and foolish gesture, as the last contact with Scott had been, according to the testimony above cited, some eight months before the trial.

The presence of Scott in the course of the alleged transaction was established beyond argument, and his participation in the alleged transaction was one of the factual points of defense. His non-appearance at the trial was urged by the petitioner upon the jury as a fact from which an inference of innocence might be drawn (SM 164). The Government in its turn casually dismissed the non-appearance of Scott with an indication that it chose to present its case through more reputable witnesses (SM 171).

With these facts and arguments presented to the jury, the Court delivered a supplemental charge to the jury as follows:

> "The Court: Ladies and gentlemen of the jury: In a conference I just had with counsel, among other points raised there was one that I want to call to your attention. You remember I used this language in the course of my charge, I said, 'Reference has been made to the non-appearance at this trial of Scott, the special employee, who accompanied Agent Coursey. No inference adverse either to the government or the defendant may be drawn by reason of the non-appearance of the special employee and in no respect may that enter into your deliberations.'
>
> That is what I told you in the course of my charge. I am afraid that language is subject to misconstruc-

tion, and I would rather charge you on that point as follows: Reference has been made to the non-appearance at this trial of Scott, the special employee, who accompanied Agent Coursey. The fact that the government did not call Scott as a government witness does not compel you to draw an inference that if Scott did testify his testimony would have been adverse to the Government. You may draw that inference or any other inference.

That completes the charge." (SM 207-208)

On October 31, 1962, judgment of conviction was entered against Comulada. Certain facts came to light subsequent to that date which are of peculiar interest. On November 13, 1962, the case of *United States* v. *Cimino*, 62 Cr. 839, proceeded to trial in the United States District Court for the Southern District of New York. On review by this Court the convictions therein were affirmed in *United States* v. *Cimino*, 321 F. 2d 509 (1963). In that trial an agent of the Bureau of Narcotics, David W. Costa, testified concerning the self-same Saul Scott.[4]

A Mr. Emery Lancer also testified in the same trial on November 19, 1962, that he was the Manager of the Hotel Manhattan Towers, and that Room 405 had been tenanted by Saul Scott, also known as Saul Fields, from October 12, 1961, until the date of his testimony. That he had not checked out of the hotel and his room charges were paid up to date. Mr. Lancer also testified that he had seen Scott two or three weeks before. The hotel records were introduced into evidence and showed that phone calls had been made from Room 405 on the 17th of November, 1962.

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4. The highlights of the testimony of Agent Costa concerning Saul Scott are contained in Appendix A attached to this brief.

The evidence concerning the whereabouts of Saul Scott was summarized by Judge Waterman in his separate opinion in *United States* v. *Cimino, supra.*

> "Under lengthy cross-examination Costa further revealed that Sapp was present at the time of Cimino's arrest, and that Costa, presumably after the arrest and indictment of both appellants, had paid the informer $200 at 'the end of the month of August or early September' of 1962. During September 1962, Costa again contacted Sapp at the Manhattan Towers Hotel; and in October, shortly before the trial below, Sapp attempted unsuccessfully to contact Costa at the latter's office.
>
> Upon redirect examination by government counsel, Costa testified that he had made attempts to contact Sapp from the latter part of September until the time of trial, but that the informer could not be reached at the bars he previously had frequented and that he was 'no longer at the Manhattan Towers Hotel.'
>
> * * After the cross-examination of Agent Costa, discussed above, Judge Bryan, on the morning of Friday, November 16, 1962, adjourned the trial until the following Monday with the request that the Government 'give [defense counsel] such reasonable assistance as they can' in locating Sapp. On Monday an Assistant United States Attorney reported to the court that Agent Costa had sought to locate the informer on Friday and Saturday at the Manhattan Towers Hotel and at known haunts elsewhere, but without success. Counsel for the defense then reported that upon simple inquiry at the Manhattan Towers Hotel it was learned that Sapp still resided in room 405, under the name 'S. Fields.' Upon voir dire examination, the hotel manager testified that

> Sapp first checked into the hotel on October 12, 1961, under the name of S. Scott; that the same person had lived in room 405, as S. Fields, since the beginning of 1962; that Sapp's room charge for 405 had been paid within the past week; and that two telephone calls from the room had been made on November 17, five days after the beginning of the trial below. Each of these assertions was supported by hotel records offered in evidence. Agent Costa was then examined by defense counsel and admitted that although he had gone to room 405 and knocked on the door during the week-end search he had left no message for the informer and had made no inquiries at the hotel concerning his whereabouts." *United States* v. *Cimino, supra,* at 516.

Putting aside for the moment any argument that Comulada and the Court were deliberately misinformed in regard to Scott, the end result is the same as if they were. The Government, through its agents, represented a material state of facts which did not exist. Apparently Agent Leya was in error when he advised the Court and jury that as recently as the very end of September of 1962, he had inquired as to Scott's whereabouts from Agent Costa, and that to his [Leya's] knowledge, Scott had not been in contact with the Bureau of Narcotics for almost eight months prior.

Agent Leya's representation is predicated upon his inquiry of Agent Costa just a few days prior to his [Agent Leya's] testimony. Leya "asked the man who he [Scott] had last contacted" who was Agent Costa? (SM 98). As a result of that inquiry, Agent Leya testified that Scott no longer resided at the Manhattan Towers Hotel, and that the last time Scott had been in contact with the Bureau of

Narcotics was the previous February. Agent Costa's testimony at the Cimino trial is flatly contradictory to the state of facts portrayed by the testimony of Agent Leya. Their testimony is mutually exclusive.

The problems which arise are not ones directed merely to the credibility of Agent Leya. Comulada makes no argument that his conviction turns on the issue of Leya's credibility. However, Leya's testimony deprived Comulada of a fair trial in certain respects.

1. Comulada was lulled into inaction by Leya's erroneous testimony that Scott had not been in contact with the Bureau of Narcotics for some eight months prior to the trial. Therefore, Comulada properly felt that efforts made during the course of the trial to locate Scott would be wasted and pointless.

2. The trial jury was seriously misled as to the current availability of Scott as a witness. The law is clear that if Scott were available to the Government, and within the control of the Government, and the Government chose not to call him as a witness, the jury could have inferred that his testimony would have been unfavorable to the Government. *2 Wigmore, Evidence*, Sections 285, 286 (1940 Edition).

Whereas the Court charged the jury as to this principle of law, the jury could only draw such an inference from evidence actually adduced. The evidence actually adduced came from Agent Leya, and was incorrect and misleading.

3. It may be contended from a combination of facts derived from this record and the Cimino record, that regardless of the accuracy of Leya's testimony, Scott was still

unavailable. The majority holding in *United States* v. *Cimino, supra,* as to this point, is that mere failure of production of a witness such as Scott is not reversible error. This contention beclouds the basic issue which remains that circumstances as to Scott changed between the time of the Comulada trial and the Cimino trial. He was actually in residence at the Manhattan Towers Hotel in October of 1962, and he was in contact with the Bureau of Narcotics during October of 1962; and if one wishes to talk about the informer privilege and the protections due an informer, there is a marked difference in cases. Comulada was unable to make bail and had been in jail for some six months prior to trial.

4. The factual situation smacks of a suppression of exculpatory evidence.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon a request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . ." *Brady* v. *Maryland,* 373 U.S. 83 (1963).

Unquestionably, disclosure of the close and recent contact of the Bureau of Narcotics with Scott would have been "evidence favorable to the accused."

The question poses itself as to whether inaccuracy in Government supplied information is the equivalent of no information. If the Government had refused to disclose the identity of the informer, the remedy available to the defendant in a case such as this one is clear.

> "Where the disclosure of an informer's identity, or of the commitment of his communication, is rele-

> vant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the Trial Court may require disclosure, and if the Government withholds the information, dismissed the action." (*Roviaro* v. *United States, supra*, at 60-61).

It is conceded that if counsel for Comulada had some brilliant power of omniscience, and was able to see the shadow of future events, his questioning of Agent Leya would have been much more precise and more specific. Viewing the testimony adduced at the trial in a fair and objective light, the following facts appear incontrovertible.

Agent Coursey did testify that Scott worked primarily with Agent Leya (S.M. 64-67). With that as the jumping off point, inquiry of Leya was made as to the present whereabouts of Scott. The normal and natural meaning of Leya's testimony gives rise to at least three separate important mis-statements.

The first is that the last person whom Scott had contacted was Agent Costa, and that took place some time in February of 1962; secondly, that Scott no longer resided at the Manhattan Towers Hotel; and, thirdly, that Scott had not been in contact with the Bureau of Narcotics since February of 1962. All of this that is illustrated above was flatly contradicted by Agent Costa in *United States* v. *Cimino, supra*.

Regardless of motive, evil or innocent, a material fact was inaccurately represented to the Court and the jury, by an Agent of the Government. Under those circumstances, Comulada did not receive a fair trial.

What use would have been made of the informer if available is not as pertinent as the fact that a defendant at trial was misled by the Government. The detailing of useless acts to be performed by the petitioner does not diminish what occurred at trial. There would have been little purpose to state that the petitioner wished to have Scott produced as a witness, or ask for production of records of contacts in the face of testimony that the trail of the witness was cold. Does the law require vain gestures to preserve its powers to right a wrong.

This case cries for the exercise of this Court's supervisory powers.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Petitioner
Gregory Comulada

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 127—September Term, 1964.

(Argued October 9, 1964 Decided January 15, 1965.)

Docket No. 28742

UNITED STATES OF AMERICA,

Appellee,

—v.—

GREGORY COMULADA,

Appellant.

Before:

LUMBARD, *Chief Judge,*
HAYS and ANDERSON, *Circuit Judges.*

Defendant appeals from conviction in the United States District Court for the Southern District of New York, Irving Ben Cooper, *J.*, for violation of the federal narcotics laws, 21 U. S. C. §§173, 174.

MICHAEL W. MITCHELL, Assistant United States Attorney, Southern District of New York, New York N. Y. (Robert M. Morgenthau, United States Attorney and John S. Martin, Jr., Assistant United States Attorney, on the brief), *for appellee.*

ALBERT J. KRIEGER, New York, N. Y. *for appellant.*

Appendix A—Opinion of Court of Appeals

LUMBARD, *Chief Judge*:

Gregory Comulada's appeal from his conviction and fifteen-year sentence[1] for selling narcotics in violation of 21 U. S. C. §174 raises two questions:

(1) Whether destruction of notes by a narcotic agent after the matter covered by the notes was incorporated into his official report required the striking of his testimony under 18 U. S. C. §3500; and

(2) Whether he was denied a fair trial because of testimony that the informer was not available, in the light of the government's failure to call the informer as a witness.

The government's testimony showed that on December 20, 1961, Agent Coursey went with the informer, Saul Scott, to Comulada's furniture store at 945 Westchester Avenue in the Bronx. Scott introduced Coursey as his cousin Irving from Philadelphia. When Coursey said that he wanted to buy two ounces of heroin, Comulada agreed to sell him the heroin for $1,000. After Coursey paid Comulada the money in cash, Comulada made a phone call and then asked Coursey and Scott to take a ride and come back. When they returned and drove up to the curb, Comulada went out to their automobile and handed to Coursey a brown paper bag which, according to Coursey and the government chemist, turned out to contain approximately one ounce of heroin. Agent Leya's testimony concerning his surveillance of the movements of Coursey and Scott outside of Comu-

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1 As Comulada had a previous federal conviction for violation of the narcotics laws he was sentenced as a second offender. 21 U. S. C. §174.

lada's store corroborated Coursey's account. Comulada did not take the stand and called no witnesses.

Agent Coursey's formal report and his daily reports were made available to defense counsel. It was developed on cross-examination that Coursey had made notes on 3 x 5 cards which he testified he destroyed when he made up his report on January 8, 1962. Coursey had taken the notes as a precautionary measure; he thought that he had referred to them in preparing his report. He had incorporated everything in the notes in his report and destroyed the cards as he needed them no longer. Defense counsel then sought a further hearing before the judge, without a jury, into the destruction of the cards. Judge Cooper denied the application on the ground that the examination had not established sufficient basis for any further inquiry. At the close of the government's proof, Judge Cooper denied a defense motion to strike Coursey's testimony on the ground that his destruction of the notes was a violation of 18 U. S. C. §3500(d).

There was no need for further *voir dire* examination of Coursey regarding his destruction of the cards. Coursey's testimony and the argument of counsel had not developed any reason why the cards should have been kept after they had served their sole purpose of recording such information as Coursey might have needed when making up his formal report; nor were there any matters which required further inquiry. Notes such as Coursey made on his 3 x 5 cards obviously serve only a limited and temporary purpose of recording details which at the time the recorder believes might have some value when a formal report is

drafted at a later time. There is nothing in 18 U. S. C. §3500 which requires that all memoranda made in the course of an investigation should be kept and preserved. *Campbell* v. *United States*, 373 U. S. 487 (1963); *United States* v. *Greco*, 298 F. 2d 247, 250 (2 Cir.), cert. denied, 369 U. S. 820 (1962); *United States* v. *Thomas*, 282 F. 2d 191, 194 (2 Cir. 1962). Indeed, every consideration of efficiency and economy would seem to require the destruction of such fragmentary memoranda as soon as they are no longer needed. Where every sensible motive supported destruction and no reason was advanced to suppose that the destruction was for an improper purpose, it would have been a needless waste of time to permit a *voir dire* inquiry.

As to the whereabouts and availability of Scott, the record does not support the defense claim that Leya's testimony was misleading and that it deprived Comulada of a fair trial.

Coursey testified on cross-examination on October 1 and 2, 1962 that he last saw Scott in February 1962, and that he did not know Scott's whereabouts. He said he knew that Scott had a criminal record for narcotic violations. Leya also testified that he had not seen Scott since February 1962; so far as he knew, Scott had not been in contact with the Bureau of Narcotics since February 1962. Leya further testified that in late September 1962 he had inquired of Agent Costa concerning Scott's whereabouts and that he inquired about Scott at "his last address," the Manhattan Towers Hotel. Apparently Agent Costa had given him this information. Leya testified that Scott no longer resided there.

On this appeal, appellant's counsel calls our attention to the fact that in November 1962, one month after Comulada's trial, at the trial of John Cimino and Joseph D'Ercole in the Southern District of New York on narcotic charges, the whereabouts of Scott was again probed by defense counsel at trial. The manager of the Manhattan Towers Hotel testified that Scott had lived in the Hotel from October 21, 1961 until the date of the manager's testimony on November 19, 1962, but from the early part of 1962 he was registered under the name of "Fields."

Counsel points out that Agent Costa testified at the Cimino trial that Scott had last been utilized by the Bureau in August 1962, that Costa had given Scott $200 at the end of August, and that the last time he had seen Scott was at "the end of the month of August or early September" of 1962. Costa said that Scott tried to reach him by telephone at his office in early October, but that he, Costa, was unavailable at the time; efforts by Costa and other agents to contact Scott during trial failed. See *United States* v. *Cimino*, 321 F. 2d 509, 516 (2 Cir. 1963) (dissenting opinion), cert. denied, 375 U. S. 967, 375 U. S. 974 (1964).

While the testimony at the Cimino trial indicates that Scott's residence may have been known to Costa as late as September 1962, there is nothing in the Cimino testimony which would indicate that Costa deliberately misled Leya as to his knowledge of Scott's whereabouts at the time Leya asked him, or that Leya or Coursey misstated their knowledge when testifying at Comulada's trial.

It is not clear what Comulada would have done with the information as to Scott's whereabouts if that information

had been brought out at trial. The defense never stated that it wished to call Scott as a witness. It was obvious from the testimony of Coursey and Leya that the man who knew most about Scott was Costa, but defense counsel did not even ask that Costa be called as a witness. Nor did the defense ask that the Narcotics Bureau produce its records as to Scott's addresses and the contacts of the Bureau with Scott. In any event, the defendant did not call upon the government to produce Scott. Nor did he ask the court to call him as the court's witness.

From what is before us, there is no reason to believe that Scott would have done more than duplicate the testimony already given by Coursey and Leya.[2] On this point, Judge Cooper correctly charged the jury that they need not draw any inference from Scott's failure to testify, but that they could draw any inference they desired, including the inference that he would have testified against the government.

Mere allegations of perjury or mistake are generally not proper subjects for appellate consideration. Resolution of conflicting statements of fact are within the competence and province of the trial court. Rule 33 of the Federal Rules of Criminal Procedure provides that within two years after final judgment the defendant may move for a new trial based on the ground of newly discovered evidence in the district court. If the case is on appeal, the district court may certify that if the case is remanded, a new trial

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2 Apparently defense counsel was aware after the publication of our opinion in the *Cimino* case, decided July 23, 1963, of Costa's testimony concerning Scott, but so far as appears no effort was made to locate Scott.

will be granted, and the appellate court will generally comply by remanding the case. Rule 33, *supra; United States* v. *Minkoff*, 181 F. 2d 538 (2 Cir. 1950); see also *United States* v. *Smith*, 331 F. 2d 145 (6 Cir. 1964) (two cases).

The judgment in the instant case was entered on October 31, 1962, thus giving Comulada until October 31, 1964 to make a motion under Rule 33 if he so desired. It is probable that defendant and his counsel were not aware of Costa's testimony at the Cimino trial at the time it was given. The decision of this court in the *Cimino* case was handed down on July 23, 1963 and appeared several months later in the Federal Reporter (321 F. 2d 509). It was headlined and printed in full on the first page of the New York Law Journal, October 24, 1963, vol. 150, no. 82. Thus it would seem that there was more than adequate time for Comulada to make the appropriate application for a new trial within the generous time requirements of Rule 33.[3]

However, as we noted above, there is no support in this record for the claim that the government deliberately mis-

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3 At such a hearing, the defendant would have to show that the witness whose testimony he sought to introduce was not available at trial (*Mesarosh* v. *United States*, 352 U. S. 1, 9 (1956)), that the defendant proceeded with due diligence to locate the witness during the trial (*Brown* v. *United States*, 333 F. 2d 723, 724 (2 Cir. 1964)), and that the witness would give testimony which would directly point to the innocence of the defendant. *United States* v. *Soblen*, 301 F. 2d 236, 242 (2 Cir.), cert. denied, 370 U. S. 944 (1962). Even taking the facts as alleged by Comulada, a new trial would not be warranted.

Even after the two year period has elapsed, a motion under 28 U. S. C. §2255, addressed to the district court, could bring on a proceeding wherein conflicting testimony on such issues could be resolved.

led the defense or that the lack of knowledge on the part of Leya and Coursey misled the defense, or deprived the defense of evidence which would have pointed to the innocence of Comulada.

We note that in case after case, in appeals from convictions for trafficking in narcotics, we hear arguments regarding the government's failure to call the informer or special employee. See, e.g., *United States* v. *D'Angiolillo*, —— F. 2d —— (2 Cir. 1965), opinion filed today; *United States* v. *Cimino, supra; United States* v. *Craze*, 313 F. 2d 757 (2 Cir. 1963); *United States* v. *Colletti*, 245 F. 2d 781 (2 Cir.), cert. denied sub nom. *Russo* v. *United States*, 355 U. S. 874 (1957); see also *United States* v. *Lanza*, 329 F. 2d 422 (2 Cir. 1964). It seems to be defense strategy to bring out facts from which it can be argued that the government or the court should have called the informer as a witness. Almost never is there a genuine effort to find the witness or to call him even when it is certain that he is available and subject to process. See *United States* v. *D'Angiolillo*, *supra*. We think that this is another such case.

Affirmed.

APPENDIX B

Statutes Involved

UNITED STATES CODE, TITLE 21

Section 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under

such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. Feb. 9, 1909, c. 100, Sec. 2(b), (d), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; June 14, 1930, c. 488, Sec. 3, 46 Stat. 586.

UNITED STATES CODE, TITLE 21

Section 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction

unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, Sec. 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, Secs. 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title 1, Sec. 105, 70 Stat. 570.

UNITED STATES CODE, TITLE 18.

§3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonable required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the in-

terests of of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Added Pub. L. 85—269, Sept. 2, 1957, 71 Stat. 595.

APPENDIX C

Excerpts from Testimony

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

GREGORY COMULADA,

Appellant.

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* * * * *

DAVID W. COSTA, a witness called in behalf of the government, resumed his testimony as follows:

Cross-Examination by Mr. Dubno:

Q. Now, who was this special employee you were assigned to? A. Sol Scott.

Q. Is that his name, would you know? A. Yes.

Q. What is his address?

The Court: When you say "Sol," how do you spell that?

The Witness: S-a-u-l.

Q. What is the address of Saul Scott? A. I don't know his present address.

Appendix C—Excerpts from Testimony
David W. Costa—for Government—Cross

Q. Did you know the address at that time? A. In November of—

Q. In November of 1960. A. I didn't know his address at that time, no, sir.

Q. Did you find his address subsequent to November, 1960? A. The only address I knew him to be living at was the Manhattan Towers Hotel.

Q. When was the last time that you saw Saul Scott? A. I would say the end of the month of August or early September of this year.

Q. Isn't Saul Scott also known as Saul Sapp? A. That is correct.

Q. This is his alias, is that right? A. Well, I believe his —I believe when he was christened—at christening time—but I don't think he has ever used that. I have always know him to use the name of Scott, but I believe his true name—I don't know on what it would show—but it would be Sapp.

Q. You are the agent that—to use your words—developed Saul Scott, is that right, as a special employee? A. Well, what do you mean by "developed"?

Q. Well, I am using your words in your report, Paragraph 1, first line, says, "During October, 1960, Agents Leya and Costa developed a special employee." A. Yes, sir, I obtained him.

Q. Well, that is your word, "developed." Now, you obtained him, is that right? A. That is correct.

Q. Now how did you obtain him? A. He telephoned me. (S. M. 307-309)

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Appendix C—Excerpts from Testimony
David W. Costa—for Government—Cross

Q. Now, with respect to this person you have identified as Saul Scott or Saul Sapp, the special employee, you testified, I believe, that you were in the past able to contact him at the Manhattan Towers Hotel, is that correct? A. That is correct.

Q. I believe you testified that the last time you saw him was in late August or in early September of this year, is that correct? A. Approximately that time.

Q. When was the last time that you contacted him? A. It was a short time after that at the hotel.

Q. What month would that have been in, sir? A. September. (S. M. 357)

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Q. In October and November of this year, Agent Costa, what efforts have you made to locate Saul Scott? A. Well, I have been uptown in various places where I knew he frequented in the past, looking for him. I tried to reach him at the hotel, but he is not there any longer.

The Court: Will you tell us, if you can, whether or not he is still registered at the hotel?

The Witness: I called him there and I didn't get an answer and I couldn't find his name on the register.

The Court: All right.

Q. Now, Agent Costa, when was the last time that Scott contacted you as distinguished from your contacting him? A. A little over a month ago I received a message that he

Appendix C—Excerpts from Testimony
David W. Costa—for Government—Cross

had called at the office, and that was the last time that he had tried to contact me.

Q. Did you speak with him directly? A. No sir. I got a message that he had called.

Q. When was the last time, to the best of your recollection, that he was utilized by either you or other agents of the bureau as a special employee, either for giving information or for entering into undercover activities with undercover agents? A. August, I believe.

Q. In August? A. Of this year.

Q. Incidentally, Agent Costa, was Scott under the supervision of any other agent or just under your own supervision? A. Under my supervision.

Q. When was the last time that you can recall that you gave Scott any money for his undercover or special-employee activities? A. August of this year. (S. M. 360-361)

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